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PROCEDURAL SUCCESSION CONCEPT AND BASES OF PROCEDURAL SUCCESSION

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Abstract

Under the Article 92, part one, of the Civil Procedural Code of Georgia, if one of the parties withdraws from a disputed legal relationship or from the legal relationship established by a court decision (citizen's death, reorganization of a legal person, concession of claim, and assignment of debt), the court shall allow substitution of that party with its legal assignee. Legal assignment is allowed on any stage of proceeding.

Keywords: Civil code, legal person, procedural, loan agreement, debtor

Within the proceedings, procedural succession may be transferred from one person to another; correspondingly, succession in proceeding is the transfer of procedural rights-obligations to the person, who had not taken part in case hearing before. Transfer of rights and obligations may be provoked on the base of the agreement (for example, concession of claim) and law (for example, citizen's death and reorganization of a legal person).

If speaking more specifically, in case of succession, an entity to the case is substituted by another entity as a result of the replacement of the participant of the legal relation (the legal substantive relation giving rise to the dispute is meant). For instance, JSC CREDIT, which filed a suit before the court about laying funds following a loan agreement, before the court sentence was passed, ceded its claim to PLANETA LTD under the Article

199 of the Civil Code of Georgia. Under the claim cession agreement, PLANETA LTD became a successor of JSC CREDIT in the legal substantive relationship and was accordingly engaged in the legal dispute as a plaintiff's successor.

The claim cession envisaged under the Article 199 of the Civil Code of Georgia, as already mentioned, is the material basis for the succession, but in any case, the succession must be established with a due procedure, as not the succession through the claim cession, but some other legal substantive relation may be the case.

For example, X Ltd. undertook paying money to Y Ltd., and as a result, the real property owned by Z Ltd. was mortgaged, as a security. Because of violating the contractual obligation by X Ltd., Y Ltd. filed an arbitral suit against its personal debtor, as well as owner of the subject of mortgage requiring charging its personal debtor with paying the debt and realizing the mortgaged property by auction. The suit of Y Ltd. was upheld by virtue of the arbitral decision.

In the period from passing the arbitral decision up to its execution, an agreement to cession of claim between Y Ltd., as a creditor and Z Ltd., as the owner of the subject of mortgage, was concluded. By virtue of the agreement, the creditor ceded the owner the right to require 1,000,000 Gel from the personal debtor, and Z Ltd. for its part, paid the mentioned amount to the creditor. Following this operation, Z Ltd., the owner of the subject of mortgage became the owner of the secured claim at the same time and the mortgage was cancelled as a result. Besides, the subject of mortgage was realized by Z Ltd. and was made the property of some other entity.

Z Ltd. filed an application to the arbitrage and based on the agreement to cession of claim concluded with the creditor, demanded its acknowledgement as a successor with regard to the funds claiming portion.

The arbitrage tried the application filed by Z Ltd. about its acknowledgement as a successor and in its decision made the following statement: “Through the actions under the agreement to cession of claim, the owner of the mortgaged things cancelled the mortgage for its property by meeting the creditor’s requirement. As a result, it has given the right to demand the funds from the personal debtor paid to the creditor as recourse. The presented, the so called “Agreement to cession of claim” describes the status virtually realized by the parties, but in a legal respect, it is not the cession of a claim given as the basis of the application envisaged by the Article 198 of the Civil Code. Assessment and explanation of the surroundings and actions described in the agreement are made following its real content and not by the title of the agreement.

The session is made not between the parties, who are already the participants of the contractual relation, but for the third entity, who becomes a party of the legal relationship through cession in particular. The origination of the claim to a debtor through the payment of the funds by the owner of the mortgaged property to the creditor is regulated by a special provision, the Article 292 of the Civil Code in particular.”

The arbitral tribunal also noted that in reality, the question to be considered was the relationship envisaged by the Article 292 of the Civil Code giving the owner the right to demand recourse payment from the principal debtor. Establishment of a party’s successor is admissible only within the limits of and without changing the content of the decision and subject of dispute, what in the given case cannot be realized for the entity demanding the recourse payment, as the owner of the recourse claim is not still the successor unconditionally recognized by the law until the legal recognition thereof, and the recognition of the right in question is necessary.

By referring to these grounds, the application of Z LTD. about its recognition as a successor was rejected.[62]

Procedural succession is of a universal nature. As a rule, a successor wholly replaces its successor in the process, but a partial succession is also possible. For instance, *A* filed a suit again *B* requiring charging *B* with paying the debt and compensating the amount envisaged by a piecework agreement. In such a case, the owner of the claims under the loan and piecework agreements is *A*. During the case trial, *A*, as it had a bill payable to *C*, ceded the claim under the piecework agreement it had to *B*, to *C*. As one can see, in such a case, the succession will be the case only in the portion of the claim envisaged by the piecework agreement and accordingly, *A* will remain a plaintiff to the case to *B* only in the loan relationship, while *C* will get engaged, as *A*'s successor in the portion of compensating money ensuing from the piecework relationship. As a result, in addition to succession, we will have co-participation in the portion of plaintiffs. Notwithstanding the above-mentioned, even in this case, the succession retains its universal nature, as in the portion of the ceded claim, the successor has the procedural rights and obligations transferred to it in full and it participates in the process on its own.

Under the Article 199 of the Civil Code of Georgia, the question as to whether the cession of claim gives rise to the parties' obligation to notify the court thereof or when to make such a notification deserves consideration.

If the point is about the plaintiff's successor, the latter has to apply to the court with the application to be allowed as the party to the case as the plaintiff's successor. It is the plaintiff's successor obliged to present the proofs of its succession to the court. If a defendant is the case, then the

[62] Decision No. 185-2009 of the Standing Arbitration of the Arbitration Chamber of Georgia of May 20, 2011.

plaintiff or the defendant's successor must apply to the court with the relevant application.[63]

Prior to some civil case trial by the Cassation Chamber of the Supreme Court of Georgia, an appellant ceded all its claims he had to the defendant to M.S. by virtue of an agreement to cession of claim of November 27, 2011. Under part 2 of the Article 199 of the Civil Code of Georgia, cession of a claim can be made through the agreement concluded between the claim owner and the third person. In such a case, the original owner is replaced by the third person. Based on this provision, I consider that the appellant lost the right of the claim he had to the defendant, which was the subject of trial for the Court of Cassation immediately with concluding the agreement, with M.S., as a new owner of the claim, engaged in the legal relations instead of him. Despite this, neither the claim assignor (appellant), nor the claim cessionary (M.S.) ever notified the Supreme Court of the origination of the grounds for succession, and as a result, the Court tried the suit of cassation of the former owner of the claim and upheld it,[64] what, I think, is a serious violation in the procedural respect, i.e. trying the case with the participation of the unsuitable party. The fact of the defendants' unawareness of such succession is also worth attention in the given case.

Succession and substitution of an unsuitable party, in respect of procedural results, are alike in certain respects, as both cases involve the substitution of a concrete physical or legal entity participating in the process by another entity; however, their legal grounds are different.

An unsuitable party may be a plaintiff without the right of claim, or defendant not liable for bearing the responsibility for the suit. In other words,

[63] Comment to the Civil Procedural Code of Georgia, second edition, Tengiz Liluashvili, Valeri Khrustali, Publishing house "Samartali", Tbilisi, 2007, pp. 179-180.
[64] Decision No. AS-380-353-2010 of the Chamber of Civil Cases of the Supreme Court of Georgia of December 5, 2011.

an unsuitable party is the entity without rights and obligations in the disputed legal relations.

In case of succession, we deal with such disputable relations, with each of its parties being suitable parties, but by considering certain legal grounds, they are substituted by other entities, who subsequently participate in the civil legal proceedings.

The analysis of the part 1 of the Article 92 of the Civil Procedural Code is the clear grounds for the principle of the procedural succession occurring only in case the succession results from the substantive law. **If succession is inadmissible under the substantive law, the procedural succession is also inadmissible**.[65] For instance, the Article 632 of the Civil Code of Georgia explains that a pieceworker has to perform the job personally only if this ensues from the concrete surroundings or nature of the job. Consequently, in case of a pieceworker's decease, the client is incapable of filing a suit against the pieceworker's heir requiring him/her to perform the job. If the pieceworker passes away after the suit is filed, the court, under sub-clause 'e' of the Article 272 of the Civil Procedural Code must drop the case due to the succession inadmissibility.

The question of succession with legal entities is interesting to consider on a practical example. For example, the Supreme Court made the following explanation about one civil case:

Procedural succession is the substitution of the parties or third entities with the entities having received the rights and obligations of the former. The case proceedings can be dropped if the succession, following the legal substantive relationship, is inadmissible.

[65] Comment to the Civil Procedural Code of Georgia, second edition, Tengiz Liluashvili, Valeri Khrustali, Publishing house "Samartali", Tbilisi, 2007, p. 178.

The grounds for the procedural succession (or the cases of withdrawal from the disputed legal relations) are envisaged by the Article 92 of the Civil Procedural Code, under which succession is admissible in case of reorganization of a legal entity (merging, consolidation, de-merger, segregation, transformation) envisaged by the Article 14 of the "Law on Entrepreneurs". As for the liquidation of a legal entity, in such a case, the case proceedings must be dropped, as no succession occurs in case of the liquidation of a legal entity.

Under the part 1 of the Article 80 of the Civil Procedural Code, all physical and legal entities of Georgia are equipped with the capability of having procedural rights and obligations. Under the part 3 of the same Article, the legal competence of a legal entity originates from the moment of its registration and ends at the moment of registration of the legal entity's liquidation.

Under the given provision, the procedural legal competence and competence of legal entities do not differ in that they originate and end simultaneously, from the moment of registration and from the moment of the canceling the registration, respectively.

The Civil Procedural Legislation of England sets the general principle of a party's substitution in legal proceedings, but does not distinguish between the substitution of a party due to its unsuitability and procedural succession. At this point, it should be noted that such institutions are totally unknown to the English Legislation, and their general formulation is as follows: in the course of a case trial, a court may establish that the entity having filed a suit is no more a participant of the disputed relationship, or right from the beginning, the rights and obligations ensuing from the

disputed legal relations belonged not to him, but to some other entity. In such a case, it becomes necessary to substitute the original party.[66]

Under the Civil Procedural Legislation of Ukraine, in case of death of a physical person, dissolution of legal person, the replacement of a creditor or debtor in the obligation and also in other cases of replacing the person in the relationship on which the dispute arose, the court involves in case the successor of a corresponding party at any stage of the civil process.[67]

Cession of the procedural rights and obligations is possible not only by the parties, but by the third entities as well. Accordingly, a successor may be engaged in the case in lieu of a party to the case (plaintiff, defendant), or in lieu of third entities.

Procedure to admit procedural succession

Admission of a procedural successor to the case is made through the ruling of the court based on the application of the relevant entity. Such an entity may be the successor itself, plaintiff, defendant or any other entity concerned. A court ruling about admitting or rejecting the substitution with a successor can be appealed through a private complaint.

For instance, part 1 of the Article 281 of the Civil Procedural Code envisages the plaintiff's obligation to indicate the successor of the defendant in case of the latter's decease (i.e. to indicate the entity, who received the hereditary property of the deceased).

The Supreme Court of Georgia gave an explanation about the legal obligation to name the successor suggesting that under the Article 3 of the Civil Procedural Code, the parties initiate the legal proceedings at the court in line with the procedures set forth by the given Code by filing a suit or

[66] Civil Process in foreign countries, A.G. Davtian, Publishing House "Prospekt", Moscow, 2009, p. 184.
[67] Civil Procedure Code of Ukraine, Article 37.

application. Each party decides on its own whether to apply to the court to defend the violated or disputed rights. Besides, a party is authorized to reject the trial of the already filed suit, what must be established by him stating his will thereof. The rule of this provision also implies a plaintiff's free choice to name the defendant. The plaintiff, under the Civil Procedural Code, has, on its own, to identify the entity violating his right or infringing his interests (clause 'b', the Article 178 of the Civil Procedural Code). In addition, in case of a party's decease, under the Article 92 of the Civil Procedural Code, a successor of a deceased person must be involved in the case.

Following the principle of disposition of the Civil Procedural Law, identifying and establishing a successor is the obligation of a party, as the court does not interfere with the entity's right to name the violator of his right.

The legal analysis of the above-indicated provisions makes it clear that false indication of the address of the opposing party by an appellant or appellant's failure to name the defendant (opposing party) entitles the court of cassation to dismiss the suit of cassation. This rule of law is necessary as the civil procedural legislation charges the court with certain obligations to the parties, such as sending notifications to them about the procedural actions. This is impossible whenever the court is unaware of the personality or address of the party.

Under the above-stated provision, the obligation to indicate the person and factual location of the defendant lies with the plaintiff, as the subject with the preferential interest in trying the case, and failure to discharge this obligation results in dismissing the case by the court.

Succession is possible at any stage of the process. The stages of the process are: (1) the period from reserving a suit for judgment up to passing a decision; (2) the period from passing the sentence up to the decision

enforcement, and (3) the period from the decision enforcement up to its execution.

In case of executing the decision, the right established by this decision is realized, and it cannot be rendered to another person after it is executed. Therefore, no succession is possible for the right granted by the executed decision either in a legal substantive, or procedural-legal respect accordingly.

At the decision execution stage, depending on whether the succession is disputed or not, this issue can be settled in different ways. For example, the Supreme Court of Georgia made the following statement in connection to the disputed succession:

"Execution of a decision is one of the process stages evidenced by the provisions in the Procedural Code setting forth the issues related to the execution of a decision. Thus, if after the court decision comes in legal force, either party withdraws from the legal relations established by the given decision, the withdrawn party is admissible to be substituted by its successor. The Chamber does not share the appellant's opinion about the question of succession to be settled by the court under the procedure of the Article 267^{1}.

It is true that the mentioned Article sets the procedure to consider the issues related to the execution of a court sentence (it is considered on the basis of the party filing an application), but only when these issues are not disputable. In addition, the succession of a party envisaged by the Article 92 of the Civil Procedural Code, if it is undisputed, is decided on the basis of a party's application, but in the given case it is disputable and therefore, the dispute must be examined through the general claim procedure. Under the Article 24 of the Georgian Law "On the Procedure of Execution", a writ of execution may be issued against the debtor named in the sentence provided

in the succession is clear. The given provision sets forth the procedure to file a suit when the succession is doubtful.

Therefore, as at the stage of executing the sentence, the question of succession became disputable, the court was right to try it by the general claim procedure and established that the defendant is obliged to pay the disputed amount."

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